89-1766

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, UNION NO. 1149 and RICK ANDERSON
Petitioners,

v.

SEAVIEW INDUSTRIES, INC., A California Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

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QUESTION PRESENTED

Where a union notifies an employer with whom it has a collective bargaining agreement containing a grievance and arbitration procedure of a potential contract violation subject to resolution by that procedure, does an absolute privilege preclude a state law defamation action under the doctrine of preemption notwithstanding the fact that the entity which is allegedly defamed is not a party to the collective bargaining agreement?

LIST OF PARTIES

The parties to the proceedings below and before this Court are:

1. Seaview Industries, Inc.
2. United Brotherhood of Carpenters and Joiners of America, Local 1149
3. Rick Anderson.

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Petitioners,

v.

SEAVIEW INDUSTRIES, INC., A California Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

Petitioners pray that a writ of certiorari issue to review the opinion of the Court of Appeals of the State of California for the First Appellate District in *Seaview Industries, Inc. v. United Brotherhood of Carpenters and Joiners of America, Union No. 1149, et al.*

OPINIONS BELOW

The opinion of the Court of Appeals of the State of California for the First Appellate District was initially reported but thereafter ordered depublished by the California Superior Court. The opinion of the Court of Appeals as modified on denying rehearing is reprinted in Appendix A. The order of the California Supreme Court

denying review, two justices dissenting, and ordering the opinion of the First Appellate District depublished is reprinted as Appendix B. The opinion of the Court of Appeals had reversed an order of the California Superior Court granting summary judgment. That order is unreported and is reproduced below as Appendix C.

JURISDICTION

The opinion of the Court of Appeals was filed on November 9, 1989. A timely petition for rehearing was filed and was thereafter denied. A timely petition for review was filed which was thereafter denied by the California Supreme Court on February 14, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTORY PROVISION INVOLVED

The relevant provision of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This case involves the efforts of the Petitioner, Carpenters Local 1149, to enforce a subcontracting clause between it and a union employer. The Petitioner's effort was limited to the sending of a letter to the employer to whom it had a collective bargaining agreement advising that employer of a potential contract violation in subcontracting to the Respondent, Seaview Industries.

The complaint in this matter was filed on June 5, 1986 by Seaview Industries against Carpenters Local No. 1149 and one of its officers, Rick Anderson.[1] The complaint filed in the Superior Court of the City and County of San Francisco contains two causes of action, one for libel and the other for intentional interference with prospective advantage. Answers were filed and prior to trial Petitioners sought summary judgment. After receiving responses, the trial court granted summary judgment on July 29, 1988. See Appendix C.

The Court of the Appeals for the First Appellate District reversed the grant of summary judgment holding that the union's conduct was not subject to either any preemption doctrine or an absolute privilege which would bar any defamation claim. The court remanded the matter to the trial court for further proceedings. A timely petition for rehearing was denied and thereafter the California Supreme Court denied a petition for review with two justices dissenting from that denial.

A STATEMENT OF THE FACTS

Seaview Industries had a collective bargaining relationship with Carpenters Local 1149. The last agreement expired on December 31, 1983 and after no new agreement was reached, the union commenced a lawful strike against Seaview on July 12, 1984. The union also filed an unfair labor practice charge against Seaview with the National Labor Relations Board which resulted in a settlement by which Seaview paid money to various trust funds established pursuant to the expired collective bargaining agreement.

In early 1984 Seaview entered into what was called a "Master Subcontract Agreement" with a shipyard located in the San Francisco area known as Southwest Marine. That Master Subcontract did not guarantee that Seaview

[1] Carpenters Local 1149 and Rick Anderson will be referred to collectively as the "union".

would perform all the work coming within the scope of that agreement but generally provided the basis upon which any work would be performed by Seaview. Seaview performed some limited work under that agreement in 1984 but there was little work of that type covered by that Master Subcontract Agreement to be performed in the San Francisco Bay Area in 1985.

Subsequently, in 1986, Seaview provided a bid to Southwest Marine for the performance of certain habitability work covered by the Master Subcontract Agreement between it and Southwest Marine. That bid was accepted and the work was scheduled to begin in mid-April 1986.

Southwest Marine and Carpenters Local 1149 were parties to a written collective bargaining agreement which contained limitations on subcontracting and a grievance and arbitration procedure. On April 1, 1986, Rick Anderson, on behalf of the union, wrote the Assistant General Manager of Southwest Marine a letter which is the subject of this lawsuit. That letter states in its entirety:

> "Dear Mr. Maybaum:
>
> This office has been informed that Mr. David Curto, dba Seaview Industries, has submitted an offer to your firm as a sub-contractor to perform certain habitability work on the Navy Ship S.S. Wichita.
>
> This letter is to formally advise your firm that Mr. Curto, Seaview Industries, does not pay prevailing wages and conditions as required under the Master Agreement.
>
> Should your firm employ Mr. Curto, Seaview Industries, as a sub-contractor, we will file a grievance under Article 23 of the Agreement against Southwest Marine, Inc. alleging violation of Article 2 Sub-Contracting.
>
> Respectfully yours,
>
> Rick Anderson,
> Financial Secretary."

At that time Southwest Marine and Local 1149 were parties to a written collective bargaining agreement which had a specific limitation on subcontracting. That subcontracting clause in its entirety reads:

> "Article 2. Subcontracting.
>
> 2.1 The agreement of the Parties with respect to the subject of subcontracting shall be that whenever the Employer subcontracts work covered by Article 1 of this Agreement to be performed on or off the Employer's premises, then persons performing such work shall receive not less than the wage and conditions provided for in this Agreement. This Article shall not apply to work subcontracted to be performed away from the Employer's premises outside of the Port areas of San Francisco, Portland and Seattle. Navigable inland waters connected with the Port areas shall be considered as part of the Port areas.
>
> 2.2 The Employer will assist with the enforcement of this Article if any questions of intent arise."

At the time the union sent the disputed letter, Mr. Anderson was aware that Seaview Industries claimed to be paying the employees the wage rate provided for in the agreement and the equivalent cost of the health and welfare and pension directly as additional lump sum wages. Seaview has always conceded that it did not provide pension and health and welfare but rather paid its employees as wages those amounts which would otherwise be utilized for the purchase of health and welfare and pension benefits which weer established through the collective bargaining agreement.

The union's position with respect to the contractual language was that the payment of cash to the employees did not meet the subcontracting language which required that any subcontractor provide to its employees "not less than the wage and conditions provided for in this Agreement." The union's position was that the failure of Seaview to provide equivalent health and welfare and pension was a violation of the subcontracting clause:

> "I was not taking the position that Seaview Industries had to contribute to any of the funds mentioned in the collective bargaining agreement. Rather, I was taking the position that Seaview Industries had to purchase an equivalent health and welfare and pension plan and that by paying the money in a 'lump sum' on the checks of the individuals Seaview Industries did not comply with the language of the contract." (Jt. App. in the court below, 45:8-14).

Thereafter, Southwest Marine advised Seaview that it "will not be awarding any subcontracts to your firm on the U.S.S. Wichita." (Jt. App. 123).

Seaview claims that as a result of the decision by Southwest Marine not to utilize its services, it lost substantial profits.

REASONS FOR GRANTING THE WRIT

Where A Union Advises The Employer Of A Potential Contract Violation, And Does Not Publish That Notice To Anyone Other Than The Parties To The Contract, Any Defamation Claim Is Completely Preempted By An Absolute Privilege.

A. It is undisputed that some two weeks before the subcontract was to begin, the union advised Southwest Marine of a potential violation of the collective bargaining agreement which would result in a grievance being filed if the subcontract were carried through. It is also undisputed that this was published to no one other than Southwest Marine and the Pacific Coast Metal Trades District Council which is the multi-union party to the collective bargaining agreement. The union's notification to Southwest Marine was a necessary part of the collective bargaining process and enforcement of the agreement. Surely, Southwest might have had a valid defense on laches or estoppel grounds had the union knowingly waited until after Seaview had commenced the subcontract to file a grievance. Moreover, since the grievance

procedure contains time limits with respect to the processing of grievances, Southwest might have raised those time limits had the union waited. Thus, the union was compelled by the collective bargaining agreement and the collective bargaining process to notify Southwest Marine at the time it first learned of the potential dispute.

With this background we now turn to the question presented of whether an entity may bring a suit on a state law claim for defamation [2] for something which is published during the course of the union's invocation of the grievance procedure.

B. There are two conflicting lines of cases from this Court which have created the unresolved issue which should receive plenary consideration by this Court. First, this Court has held that defamation cases arising in the labor context are subject to state law claims and are not totally preempted. Thus, *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966) "held that libel actions under state law were pre-empted by the federal labor laws to the extent that the State sought to make actionable defamatory statements in labor disputes which were published with knowledge of their falsity or reckless disregard for the truth." *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 273 (1974). Thus, in *Linn* and *Austin* this Court permitted libel actions to proceed subject to the elevated standards of proof adopted by this

[2] We treat the defamation and interference with prospective advantage together. If the communication is subject to a privilege, then the interference with prospective advantage claim necessarily fails. See *Deaile v. General Telephone Company*, 40 C.A.3d 582 (Ca.App. 1978) and *Local 472 of the United Association v. Georgia Power Company*, 684 F.2d 721 (11th Cir. 1980). Similarly, the interference with prospective advantage claim would be subject to preemption. See *Connell Company v. Plumbers and Steamfitters*, 421 U.S. 616, 635 (1975) (state anti-trust law preempted when applied to collective bargaining agreements) and *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959) (state anti-trust law cannot invalidate terms of a collective bargaining agreement).

Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Consistent with this the lower courts have entertained defamation actions.

The second line of cases which intersects in these circumstances of defamation are those cases which have preempted all state law tort claims where the "evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985). And, most recently, this Court has repeated that the application of state law is preempted "only in such application requires an interpretation of a collective bargaining agreement." *Lingle v. Norge Division of Magic Chef*, 486 U.S. ——, (1988).

It is plain from these lines of cases that under *Linn* and its progeny Seaview's action for defamation and interference with contract may be subject to state law adjudication. It is equally clear that under *Lueck* and *Lingle*, Seaview's claim arises out of the union's effort to enforce the collective bargaining agreement through the grievance and arbitration procedure and is therefore preempted under § 301. It is the collision of *Linn*, *Austin* with *Lueck* and *Lingle* that compels this Court's consideration of this case.

The circuit courts have generally resolved this conflict by holding that there is an absolute privilege to any effort by a union to enforce the grievance procedure and that defamation claims are therefore barred by an absolute privilege. The Tenth Circuit has twice held that such statements are subject to an absolute privilege. See *General Motors Corporation v. Mendicki*, 367 F.2d 67, 71 (10th Cir. 1966) and *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274, 278 (10th Cir. 1981). The Ninth Circuit adopted a similar absolute privilege position although it has recently qualified that position. Compare *Hyles v. Mensing*, 849 F.2d 1213, 1217 (9th Cir. 1980) and *Scott v. Machinists Automotive Trades District Lodge*

No. 190, 827 F.2d 589, 594 (9th Cir. 1987) with *Tellez v. Pacific Gas & Electric Co., Inc.*, 817 F.2d 536, 538 (9th Cir. 1987), *cert. denied*, 484 U.S. 908 (1987), *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057, 1063 n.4 (9th Cir. 1989) and *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 645 (9th Cir. 1989). Two Circuits have relied upon the qualified privilege position of the *New York Times* standard without directly rejecting the absolute privilege position. See *Garziano v. E.I. Dupont De Nemours & Co.*, 818 F.2d 380, 387-88 (5th Cir. 1987), *Strachan v. Union Oil Company*, 768 F.2d 703, 706 (5th Cir. 1985 and *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 624-25 (8th Cir. 1989). Cf. *Local 472 of the United Association v. Georgia Power Company, supra*, 684 F.2d at 727-28. (qualified privilege in tortious inference claim).

While the circuits have either adopted the absolute privilege position or the qualified privilege position, the district courts have demonstrated the same uncertainty and ambivalence.[3] While the federal courts have demonstrated disarray, the state courts which have been faced with these issues have drawn directly conflicting positions. Thus, in those cases where defamation claims are brought in state court, some state courts have adopted the absolute privilege position. We note in the margin those state courts which have adopted the absolute privilege position in light of the various federal law interests.[4]

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[3] See *Green v. Hughes Aircraft Co.*, 630 F.Supp. 423, 427-28 (S.D. Cal. 1985) (complete preemption and absolute privilege), *Hall v. Central Transport Inc.*, 628 F.Supp. 784, 791 (N.D. Ind. 1986) (absolute privilege and a qualified privilege where statements published to those beyond the grievance procedure), *Jofkes v. Kaufman*, 324 F.Supp. 660, 663 (D.D.C. 1971) (absolute privilege), *Gregory v. Simon Brothers, Inc.*, 640 F.Supp. 1252, 1256-57 (N.D. Ind. 1986) (finding all defamation claims preempted while declining to apply an absolute privilege), and *Brooks v. Solomon Co.*, 542 F.Supp. 1229 (N.D. Ala. 1982) (applying absolute privilege).

[4] See *Thompson v. Public Service Co.*, 773 P.2d 1103 (Colo. App. 1980); *Surrency v. Harbison*, 489 So. 2d 1097, 1101-1104 (Ala.

There are on the hand other states which have specifically opted for the qualified privilege and have rejected the absolute privilege.[5] In this case the court below held that there was only a qualified privilege to the union's communication to Southwest Marine. App. 13a. Because it found that there was sufficient malice in the record it remanded the matter to the trial court for further proceedings.[6] There are, of course, compelling

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1986); *Aubuchon v. International Mill Service*, 167 Ill.App.2d 965, 522 N.E.2d 898 (1988) but Cf., *Fisher v. Illinois Office Supply Co.*, 130 Ill.App.3d 996, 474 N.E.2d 1263, 1266-67 (Ill.App. 1984) and *Krasinski v. United Parcel Service, Inc.*, 124 Ill.2d 483, —— N.E.2d —— (Ill.App. 1988); *Louisville & Nashville Railway Co. v. Marshall*, 586 S.W.2d 274, 282-84 (Ky.App. 1979) (dicta); *Rougeau v. Firestone Tire & Rubber Co.*, 274 So.2d 454, 457 (La.App. 1973); *Fulghum v. United Parcel Service*, 424 Mich. 89, 378 N.W.2d 472, 477-79 (1985) (concurring opinion); *Turner v. Gateway Transportation Co.*, 569 S.W.2d 358, 360 (Mo.App. 1979); *Kloch v. Ratcliff*, 221 Neb. 241, 375 N.W.2d 916, 919-20 (1985) (approving absolute standard but finding no malice under qualified privilege standard); *Neece v. Kantu*, 84 N.M. 700, 507 P.2d 447, 452-53 (N.M.App. 1973), *cert. denied*, 84 N.M. 696, 507 P.2d 443 (1973) (absolute privilege where in context of grievance procedure, conditional privilege if not part of grievance procedure); *Agriss v. Roadway Express Co.*, 483 A.2d 450, 467 (Pa. Super 1984); *Sturdivant v. Seaboard Service System Ltd.*, 459 A.2d 1058, 1059-60 (D.C.App. 1983) and *DeLuca v. Reader*, 227 Pa. Super 392, 323 A.2d 309, 313 (Pa. Super. 1974) (although approving *Mendicki*, holding that there was no malice in defamation case).

[5] See *Bailey v. Sams*, 24 Ohio App.3d 137, 493 N.E.2d 966, 968 (Ohio App. 1985); *Ezekiel v. Jones Motor Co.*, 374 Mass. 382, 372 N.E.2d 1281 (Mass. 1978); *Bird v. Meadow Gold Products Corp.*, 60 Mis. C.2d 212, 302 N.Y.S.2d 701, 705 (1969) (adopting qualified privilege position) and *Henthorn v. Western M & R*, 226 Md. 499, 174 A.2d 175 (Md. 1961).

[6] In *DeTomaso v. Pan American World Airways, Inc.*, 43 Cal.3d 517 (1987), the California Supreme Court held that a claim of defamation made against an employer under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, was preempted. Although relying upon *Mendicki*, the court did not go so far as to determine that there was an absolute privilege. *Id.* at 531-532. The court did, however, specifically reject any distinction between statements made

reasons related to the enforcement of collective bargaining agreements that should trigger the absolute standard. The federal courts which have had occasion to consider this issue have uniformly held that statements made during the grievance procedure under collective bargaining agreements are subject to a privilege because of these federal interests. This conclusion was succinctly stated in *Hyles v. Mensing*, *supra* in rejecting a defamation claim:

> "We agree with the district court that the allegedly false work infraction reports and testimony are privileged and do not support state tort claims for defamation.
>
> Federal labor policy promotes the collective bargaining process as a means of stabilizing the relationship between employers and employees. It is 'an effort to erect a system of industrial self-government'. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580, 80 S.Ct. 1347, 1351, 4 L.Ed.2d 1409 (1960). Grievance procedures established by the CBA are crucial to maintaining that system. '[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government . . . The processing of disputes through [that] machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.' Id. at 581, 80 S.Ct. at 1352.
>
> To allow state defamation claims based on statements made in grievance proceedings would weaken the grievance system as a means of industrial self-government. Exposing witnesses to this potential tort liability would inhibit and discourage forthright and sincere testimony and participation in the system. See *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274, 279 (10th Cir. 1981) ('[D]amage suits predi-

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during the investigation of a grievance as opposed to statements made during the actual grievance proceeding. *Id.* at 531.

> cated on statements made in the grievance procedures would tend to interfere with frank and strong statements of positions in such proceedings.')
>
> In the interest of protecting the CBA and its grievance procedures, we conclude that, as a matter of federal law, statements that are made in grievance proceedings established by a CBA and are not published to persons lacking legitimate interests in them are privileged and may not support a state tort claim." (849 F.2d at 1217, footnote omitted).

The court below declined to apply the absolute privilege on the ground that Seaview was not a party to the collective bargaining agreement and therefore "cannot invoke the grievance procedure and [is] not governed by it." App. 14a. Thus, the court held that there was conditional privilege "to make the assertions to Southwest Marine it made here . . ." *Id.* at p. 14a. That rationale was flawed.

First, statements made during the course of the grievance procedure by both union and management representatives often involve those who are not governed by the collective bargaining agreement. For example, supervisors and management are often subject of accusations or complaints by union officials.[7] Second, where disputes concern relationships with customers the conduct of those customers is often called into question. This will commonly occur where drivers or salespeople are accused of improper conduct directed towards customers and suffer discipline arising out of those allegations. Third, as is illustrated in this case, those who are vendors or subcontractors to the employer are often the subject of dis-

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[7] See, *e.g.*, *Scott v. Automotive Machinists District Lodge No. 190, supra.* This Court has also held that claims by individuals who are not members of the bargaining unit that the union has interfered with contractual relationship are preempted. *Operating Engineers v. Jones*, 460 U.S. 669 (1983).

cussion.[8] Fourth, there are those who are involved in the regulation of the workplace that are not subject to the grievance procedure or the collective bargaining agreement and may be the subject of discussion. Drug testing companies are a prime example but often other companies come in contact with the work force as agents of the employer.[9]

Second, the ruling of the court below relies upon the theory that employers are governed by the grievance and arbitration procedure. Although this is often true, there are more often circumstances where neither the employer nor another worker who alleges to be defamed has a remedy under the grievance procedure.[10]

Third, there is no practical basis upon which to impose different concepts of privilege depending upon the person who is the subject of discussion during the grievance procedure. The ruling of the court below would impose a conditional privilege depending upon the relationship of the party to the contracting parties, creating a

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[8] The parties agree that the subcontracting clause may lawfully be enforced. It is a subcontracting clause permitted under 29 U.S.C. § 158(e). The enforcement of such clauses is subject to extensive regulation by the National Labor Relations Act. The clause in this case is known as an area standards clause and is approved for the purpose of preserving work. See *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967). Thus, any claim that the subcontracting clause has been improperly enforced under state law theory would be preempted. *Connell Company v. Plumbers and Steamfitters, supra.*

[9] See, for example, *Sturdivant v. Seaboard Service System, Ltd., supra* (suit against outside company providing security reports to employer).

[10] For example, where an employee who claims he is defamed by another employee, has no grievance to file against the employer or the union. Likewise, the company may be prohibited from filing a grievance against the employee who makes the alleged defamatory statement.

conflicting level of privilege applicable to the same publication.

Fourth, the rationale of the court below could hardly be applied had the union's statements been made during an actual arbitration, in the context of the well established testimonial privilege contained in California Civil Code § 47.2. The union's claim no matter how false that Seaview Industries did not pay prevailing wages as required by the contract would not be subject to a defamation action had it been made solely in the arbitration proceeding.[11] Thus, there is no basis upon which to distinguish among those who are the subject of the allegedly defamatory publication. Here, that problem is heightened because the union's communication was only to Southwest Marine which had an intense interest in learning the union's position so as to prevent it from assuming any monetary liability for violating the subcontracting clause.

C. This Court needs to grant full consideration of the issue of whether there is an unconditional privilege or absolute privilege applicable to the enforcement of collective bargaining agreements by invocation of the grievance and arbitration procedure. The opinion of the court below will have the effect of severely restricting unions and employers from forthrightly resolving disputes which arise under the terms of a collective bargaining agreement. And, as we have demonstrated, notwithstanding the fact that some courts have adopted an unqualified privilege to such statements, other courts have interposed only a qualified privilege. The divergence between the courts of appeal and the conflicts between the various

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[11] Ironically, the union would have been completely protected had it refused to state the basis of its grievance but only informed Southwest that they would elaborate the basis of the grievance only at an arbitration proceeding, and thus avoiding the preliminary steps of the grievance procedure. This is not a result which encourages resolution of cases prior to arbitration.

state courts which have considered this issue warrant plenary consideration of this important issue.[12]

D. This Court has granted certiorari in *United Steelworkers of America v. Rawson*, 115 Ida. 785, 770 P.2d 794 (1980), *cert. granted*, —— U.S. —— No. 89-322 and has heard oral argument in that case. The question presented is one which is potentially dispositive of the issue posed by this Petition. In that case the Court must determine whether a state law claim for negligence is preempted by the duty of fair representation. This Court must determine whether an issue so important as safety is one which is governed by the duty of fair representation as opposed to the state law interest. We suggest that this Court may consider staying consideration of this Petition until it issues its opinion in *Rawson* at which point it may be appropriate to request further briefing by the parties or, in the alternative, to summarily grant this Petition and remand to the Court of Appeals for further consideration.

[12] As the cases we have cited note, this is an issue which has been recurrent since at least the Tenth Circuit's opinion in *General Motors Corporation v. Mendicki*, *supra*. It is thus an issue which will recur until resolved by this Court.

CONCLUSION

For the reasons suggested above this Court should grant plenary consideration of the question presented. In the alternative this Court should grant the Petition, reverse the lower court and remand in light of this Court's decision in *Rawson* if appropriate.

Respectfully submitted,

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May 15, 1990

APPENDICES

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

A043359

San Francisco Superior Court No. 859302

SEAVIEW INDUSTRIES, INC.,
Plaintiff/Appellant,
v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA, UNION NO. 1149, *et al.*,
Defendants/Respondents.

[As Amended on Denial of Rehearing]

[Filed Nov. 9, 1989]

Respondent union wrote a letter to an employer with whom the union had a collective bargaining agreement. The letter claimed that appellant, a non-union employer, was not providing to its non-union employees the wages and benefits called for by the subcontracting clause of the union's collective bargaining agreement. The union's letter threatened to file a grievance under the procedure established by the collective bargaining agreement if a subcontract was awarded to appellant.

The letter allegedly caused appellant to lose a large business order. Appellant sued the union for libel and

interference with prospective economic advantage, alleging that in fact the union knew the contents of the letter were false and maliciously sent the letter. The union moved for summary judgment on the grounds that appellant's action was preempted by federal law, and that the union's statements regarding an alleged grievance under the collective bargaining agreement were privileged. The trial court granted summary judgment.

We reverse because we conclude that appellant's claims were not preempted by federal law. Further, we conclude that the privilege defense available to the union was a conditional, not an absolute, privilege; and that appellant presented sufficient evidence of malice to defeat summary judgment.

I. FACTS AND PROCEDURAL HISTORY

Appellant is a ship's habitability subcontractor, that performs work on the living accommodations on board ships. Appellant had a collective bargaining agreement with the union which expired at the end of 1983. It was not renewed. In 1984, appellant entered into a "Master Subcontract Agreement" with another company, Southwest Marine, Inc., under which appellant would perform habitability work on four U.S. Navy ships.

The relationship between appellant and the union turned increasingly bitter. The union struck appellant in July 1984, interfering with the habitability work and forcing appellant's employees to approach the job site by sea rather than by land. The union also filed charges with the National Labor Relations Board (NLRB), alleging that appellant must make certain benefit payments to trust funds on behalf of employees because appellant had not properly terminated its obligation to do so under the expired collective bargaining agreement. The NLRB charges were settled.

In December 1984, the union filed [1] suit in U.S. District Court against appellant concerning the issue of the contested benefit fund contributions. Appellant defended on the grounds that the NLRB proceeding had concluded that issue, and the union dropped its suit. About three weeks later, the union wrote the letter to Mr. Maybaum, Assistant General Manager of Southwest Marine, which became the subject of this suit. The letter reads as follows: "Dear Mr. Maybaum: [¶] This office has been informed that Mr. David Curto, dba Seaview Industries, has submitted an offer to your firm as a sub-contractor to perform certain habitability work on the Navy Ship S.S. Wichita. [¶] This letter is to formally advise your firm that Mr. Curto, Seaview Industries, does not pay prevailing wages and conditions as required under the Master Agreement. [¶] Should your firm employ Mr. Curto, Seaview Industries, as a sub-contractor, we will file a grievance under Article 23 of the Agreement against Southwest Marine, Inc. alleging violation of Article 2 Sub-Contracting. [¶] Respectfully yours, [¶] Rick Andersen [¶] Financial Secretary."

Article 2 of the collective bargaining agreement between the union and Southwest Marine, referred to in the union's letter, provides in pertinent part as follows: "Article 2. Subcontracting. [¶] 2.1 The agreement of the Parties with respect to the subject of subcontracting shall be that whenever the Employer subcontracts work . . . persons performing such work shall receive not less than the wage and conditions provided for in this Agreement. . . . [¶] 2.2 The Employer will assist with the enforcement of this Article if any question of intent arises."

After the union's letter, Southwest Marine informed appellant that it feared the prospect of labor disruptions,

[1] The union points out the named plaintiff in this prior action was the Marine Carpenters Pension Fund, which shares adjoining office space with the union at 117-119 Broadway in Oakland. For purposes of brevity we refer to both entities as "the union."

and that appellant could not do the habitability work in question.

Appellant contends that in fact the union knew, apparently as a result of the previous litigation over benefit fund payments, that appellant was paying its workers the same wage rates as those provided for in the relevant agreement, and was paying its employees additional amounts in cash equivalent to the benefit fund payments which appellant was no longer making to the union's trust fund. Appellant alleged that the union falsely and maliciously informed Southwest Marine to the contrary, thereby depriving appellant of the habitability work on the Wichita and committing the torts of libel and interference with appellant's prospective economic advantage.

The union moved for summary judgment on the grounds that (1) appellant's claims were preempted by federal law; and (2) the union's actions in sending a letter regarding a possible grievance under its collective bargaining agreement were privileged, and could not form the basis of the torts alleged. The trial court granted the motion. Appellant timely appealed.

II. DISCUSSION

A. *Preemption*

Under the latest U.S. Supreme Court precedent, causes of action founded upon state law are only preempted by section 301 of the federal Labor Management Relations Act (LMRA) (29 U.S.C. § 185) (hereafter section 301) where resolution of the state tort would "require" an interpretation of a collective bargaining agreement governed by federal law. (*Lingle* v. *Norge Div. of Magic Chef, Inc.* (1988) —— U.S. ——, —— [108 S.Ct. 1877, 1882]; accord *Rodriguez* v. *Yellow Cab Cooperative, Inc.* (1988) 206 Cal.App.3d 668, 679, pamp. No. 3 [citing *Lingle*]; *DeSoto* v. *Yellow Freight Systems, Inc* (9th Cir. 1988) 851 F.2d 1207, 1207-1208 ["*Lingle* holds

[that] the state law claims that do not require interpretation of a collective-bargaining agreement are not preempted by section 301. . . . We accordingly reverse our holding that DeSoto's state law claim was preempted by section 301 and remand to the district court for further proceeding on the state law claim."].)

The *Lingle* decision establishing this particular standard for preemption under section 301 was decided after the trial court's decision in this case, and was not available for that court's consideration in analyzing the preemption issue. Appellant argues that its tort claims do not require interpretation of any collective bargaining agreement and are not preempted by federal law.

The only post-*Lingle* decision disclosed by our research which has analyzed this question, of federal preemption of similar tort claims for interference with contractual relationship in a collective bargaining context, found that such claims brought against an entity not a party to the collective bargaining agreement were *not* preempted by federal law because they did not require interpretation of a collective bargaining agreement. (*Dougherty* v. *Parsec, Inc.* (6th Cir. 1989) 872 F.2d 766, 771 ["Therefore, this court holds, on remand [from the U.S. Supreme Court] and in light of *Lingle*, that Dougerty's claim against Seaboard for tortious interference with contract is not preempted."].)

Analysis of pre-*Lingle* cases decided in analogous contexts fortifies our conclusion that the claim in issue here is not federally preempted. In *Linn* v. *Plant Guard Workers* (1966) 383 U.S. 53, a state law action was instituted alleging that during the course of a union organizing campaign (i.e., before a § 301 labor contract could have been formed between the parties) an employer official was maliciously libeled. The U.S. Supreme Court allowed the state law action to proceed despite the union's claim that federal labor policy and the jurisdiction of the NLRB barred the claim. "We conclude that

where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state rmedies if the complainant pleads and proves that the statements were made with malice and injured him." (*Linn* v. *Plant Guard Workers*, *supra*, 383 U.S. at p. 55.)

More recent cases, decided under section 301, also conclude that a claim is not federally preempted where it has only a peripheral relationship to a collective bargaining agreement. "In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." (*Allis-Chalmers Corp.* v. *Lueck* (1985) 471 U.S. 202, 212, fn. omitted.) The right to be free from defamation and other tortious conduct is such a state rule proscribing conduct, which is independent of any labor agreement.

In *Caterpillar Inc.* v. *Williams* (1987) —— U.S. ——, —— and footnote 9 [107 S.Ct. 2425, 2431 and fn. 9], the high court likewise held that union members could assert rights against their employer which were independent of the collective bargaining agreement, because the rights asserted arose from obligations which predated the plaintiffs' union membership and converge under the collective bargaining agreement. Since the rights allegedly arose at a time when the plaintiffs were not parties to the collective bargaining agreement, their rights were "not substantially dependent upon interpretation of the collective-bargaining agreement." (*Ibid.*)

The union, however, argues here that the claim against it is preempted by section 301, because reference must be made to the collective bargaining agreement in order to determine whether the union's statements about the alleged noncomplying wage rates and benefit contributions were false. A similar contention was flatly rejected

by the Ninth Circuit in *Carpenters Southern Cal. Admin.* v. *Majestic Housing* (9th Cir. 1984) 743 F.2d 1341, 1344-1345. The issue in that case was whether a union's action against a third party to recover on a mechanics' lien was governed by section 301, because the entitlement to and the amount of the lien depended upon the terms of the collective bargaining agreement the union had with another party, the employer. "[T]he district court found that jurisdiction [under § 301] existed because calculation of the amount that [plaintiff] could recover through foreclosure of its lien would require reference to [the employer's] collective bargaining agreement with the Union, and would require proof that [the employer] had breached the collective bargaining agreement by failing to make the required contributions. [¶] We think the district court has given section 301 of the LMRDA an excessively expansive interpretation." (*Id.* at p. 1344.) "The [Supreme] Court in *Franchise Tax Board* [v. *Construction Laborers Vacation Trust* (1983) 463 U.S. 1] made clear, however, that the preemptive force of section 301 was not without limits. The Court noted that 'even under § 301 we have never intimated that any action merely relating to a contract within the coverage of § 301 arises exclusively under that section.'" (*Ibid.*; accord *Williams* v. *Caterpillar Tractor Co.* (9th Cir. 1986) 786 F.2d 928, 935, affirmed (1987) —— U.S. —— [107 S. Ct. 2425] ["For jurisdiction to lie under § 301, 'the rights and liabilities of the parties . . . must be a product of the bargaining agreement itself, and not of some other origin,'" quoting *Lumber Prod. Indus.* v. *W. Coast Indus. Rel.* (9th Cir. 1985) 775 F.2d 1042, 1046].)

Three recent decisions by other appellate courts also indicate that under the standard fashioned in recent U.S. Supreme Court cases, of which *Lingle* is the latest, a state law tort claim may be brought, even though a collective bargaining agreement has some tangential bearing on the dispute. The relevant question is whether the state law claim requires interpretation of the collective

bargaining agreement. (*Rawson* v. *United Steelworkers of America* (Idaho 1988) 770 P.2d 794, 797, cert. applied for August 1989, Supreme Ct. Dock. No. 89-322 [under *Lingle*, claim could be brought against union for negligent failure to inspect a mine, even though union claimed its allegedly tortious conduct was not a violation of its contractual duty under the provisions of the collective bargaining agreement: "[I]n the instant case, no interpretation of the collective-bargaining agreement is required to determine whether the union member . . . committed a tort when he committed various acts and omissions . . . . Rather, such alleged acts of negligence are measured by state tort law."]; *Walton* v. *Carolina Tel. & Tel. Co.* (N.C.App. 1989) 378 S.E.2d 427, 432 [state claim for fraud not preempted by federal law even though employer claimed its actions were permitted by the collective bargaining agreement: "Walton's fraud claim at most only tangentially concerns provisions of that agreement. [Citations.]"]; and see also *Miles* v. *Melrose* (5th Cir. 1989) 882 F.2d 976, 991 ["Since reference to the [labor] contract is not needed to resolve the issue of liability, the claim . . . [against the union] is sufficiently independent of the contract and not preempted by § 301."].)

In short, what the Ninth Circuit said in *Carpenters Southern*, *supra*, said again in *Lumber Prod.*, *supra*, and said yet again in *Williams*, *supra*; and what the Supreme Court said in *Linn*, *supra*, and said yet again in *Franchise Tax Board* v. *Construction Laborers Vacation Trust* (1983) 463 U.S. 1, *Allis-Chalmers*, *supra*, *Caterpillar*, *supra*, and now most recently in *Lingle*, *supra*, is that a state law claim is not preempted merely because the claim bears some tangential relation to federal labor policy or to the terms of a collective bargaining agreement. To put the shoe on the other foot, we do not think that a libel claim against an employer would be federally preempted where the plaintiff was an accountant who alleged he was falsely and maliciously accused of em-

bezzling employee trust funds, even though reference might be made to the governing collective bargaining agreement in order to ascertain the amount of the funds in issue and whether the employer knew that the accountant's actions were in accord with the agreement. In that case as in this one, the claim would "merely relate[]" to, and would not require interpretation of, the collective bargaining agreement in the relevant sense.

Further, even assuming arguendo that a state law claim *were* preempted in the sense that it must be governed by federal law, it would not necessarily be barred from assertion. (See *Baylis* v. *Marriott Corp.* (2d Cir. 1988) 843 F.2d 658, 664 [indicating that such a claim may be brought under the "federal common law"; "Thus, some federal courts have permitted claims asserting tortious interference with labor contracts governed by the LMRA."]; cf. *Lingle* v. *Norge Div. of Magic Chef, Inc.*, *supra*, —— U.S. at p. ——, fn. 12 [108 S.Ct. at p. 1885, fn. 12] ["Thus, as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted."]

Nor would a state court be unable to hear such claims simply because they arose, at least in part, under federal law. There is no exclusive federal jurisdiction under section 301. (See *Dowd Box Co.* v. *Courtney* (1962) 368 U.S. 502, 506 ["The statute [section 301] does not state nor even suggest that such [federal] jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be."]) Thus, the claim could simply proceed in state court like any other claim arising under federal law, where no party has sought to timely remove the claim to federal court.

We conclude in any event that, under the applicable *Lingle* standard, the claims asserted were not federally preempted. The only issue here is whether the sender of th letter in question falsely and maliciously represented that appellant's business practices were other than they in fact were. To resolve that question, "no interpretation of the collective-bargaining agreement is required" (*Rawson* v. *United Steelworkers of America*, *supra*, 770 P.2d at p. 797); and the union's acts are simply "measured by state tort law." (*Ibid.*) In short, neither the reference by the union, in its allegedly libelous letter to Southwest Marine, to a conditional future intention to file a grievance under Article 23 of its collective bargaining agreement, nor the reference to prevailing wages and conditions under its "Master Subcontract Agreement," required "interpretation" of the collective bargaining agreement on the state law issues of libel and interference with prospective economic advantage alleged in appellant's complaint. The disputes at issue here only tangentially involve reference to provisions of such agreement, involve a separate state law analysis that does not turn on the collective bargaining agreement, and accordingly are not preempted by federal law. (*Lingle* v. *Norge Div. of Magic Chef, Inc.*, *supra*, —— U.S. at ——, ——, fn. 12 [108 S.Ct. at pp. 1882, 1885, fn. 12].)

B. *Privilege*

The union also suggests that appellant's claims are defeated by an absolute privilege. It is true that both state and federal courts have recognized that a *party* to a collective bargaining agreement may not sue the other party, its employees, members, or agents, for asserting positions regarding a possible labor grievance, because this is what their agreement requires them to do. (*DeTomaso* v. *Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, 530-531, cert. denied (1987) —— U.S. —— [108 S.Ct. 100] ["The parties to such [a collective bargaining agreement must be allowed to perform their

duties without judicial interference in all but the most outrageous of cases. We do not find that the acts complained of establish such an outrageous case. . . . [¶] Similarly, statements made . . . during formal or informal disciplinary hearings cannot support a cause of action. There can be no doubt that the statements made . . . are privileged and cannot form the basis for liability at law, whether or not they were made during an actual grievance proceeding."]; see also *Wallin* v. *Vienna Sausage Manufacturing Co.* (1984) 156 Cal.App.3d 1051, 1056 [statements made in union grievance hearing protected by privilege under state law]; accord *Cuenca* v. *Safeway San Francisco Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 994 [citing *Wallin*]; cf. e.g., *Local 472, etc.* v. *Georgia Power Co.* (11th Cir. 1982) 684 F.2d 721, 728 ["The free exchange of opinions, however harsh or one-sided, is essential to the smooth functioning of relations between labor and management. . . . Such communications must be permitted and we hold that under federal common law they are privileged. As a matter of law, the letters . . . do not establish the tort of interference with contractual or business relations."]; accord *Hasten* v. *Phillips Petroleum Co.* (10th Cir. 1981) 640 F.2d 274, 277, 279 [letter sent to other party pertaining to issue grievable under labor contract held absolutely privileged in libel action even though letter was alleged to be "false, untrue, and malicious"]; see also *Hyles* v. *Mensing* (9th Cir. 1988) (849 F.2d 1213, 1217.)

However, the union has not cited a case, nor has our own research discovered one, which extends this absolute privilege to actions by *third parties*, neither employees nor members of the union, who are subjected to tortious conduct in communications between parties to a collective bargaining agreement. The rationale which supports application of such an absolute privilege to the claims made by parties to the collective bargaining relationship does not support its extension to claims by third parties. There is no danger, for instance, that third parties will employ

tort actions as a strategy to avoid arbitration of their grievances under the labor contract, because third parties areby definition not party to the contract and cannot invoke or avoid arbitration. Further, extension of such a privilege to third parties' claims has little to recommend it in terms of furthering legitimate interests of sound social policy. The parties to a collective bargaining relationship may in some sense have assumed the risk of certain types of otherwise actionable tortious conduct against each other simply by virtue of their relationship. We do not see, however, why a third party should be charged with having assumed the risk that it will be injured by such tortious conduct.

We believe that no absolute federal privilege applies to defeat such a third party's claim, and that instead only a qualified privilege under state law (Civ. Code, § 47, subd. 3)[2] is applicable.

We have recognized the applicability of this qualified privilege in the recent case of *Cuenca* v. *Safeway San Francisco Employees Fed. Credit Union*, *supra*, 180 Cal. App.3d at pp. 995-996. There, we applied the privilege of Civil Code section 47, subdivision 3 to assertions between "a communicator and a recipient with a common interest, although to be protected the communication must be one 'reasonably calculated to further that interest.' [Citation.]" (*Cuenca* v. *Safeway San Francisco Employees Fed. Credit Union*, *supra*, 180 Cal.App.3d at p. 995.) We also noted that "If . . . malice [were] established, its existence would vitiate the qualified privilege . . . ." (*Id.* at p. 996.)

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[2] Civil Code section 47, subdivision 3 provides: "A privileged publication or broadcast is one made—[¶] . . . [¶] In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

We note that the same would be true under U.S. Supreme Court authority. In *Linn* v. *Plant Guard Workers*, *supra*, the U.S. Supreme Court held that this same qualified privilege applied to the libel claim of a non-party to a collective bargaining agreement against a union: "We apply the malice test to effectuate the statutory design with respect to pre-emption. Construing the [National Labor Relations] Act to permit recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act." (383 U.S. at p. 65.)

The evidence presented on the summary judgment motion here, which included evidence tending to show that the union knew the true facts but was motivated by ill-will towards appellant arising out of the outcome of the parties' previous litigation and past differences, would be sufficient to defeat the motion on the issue of whether malice existed. The evidence could justify a reasonable conclusion by an ultimate finder of fact that the union was motivated by malice in making the communication in issue here. Consequently, summary judgment was not proper.

We emphasize we in no way detract from those precedents which hold that the parties to a collective bargaining relationship may not pursue each other in court over statements made in grievance proceedings. We simply hold that the parties to those proceedings have only a qualified, not an absolute, privilege as to claims made by third parties; and that those grievance proceedings may not be used with absolute immunity to perpetrate malicious attacks on third parties.[3]

[3] We reject the contentions of the union made by its petition for rehearing.

The union offers a variation of its argument that appellant's claims are preempted because they would allegedly require inter-

III. DISPOSITION

The judgment is reversed, and the case is remanded for further proceedings consistent with the views expressed herein.

PETERSON, J.

WE CONCUR:

SMITH, A.P.J.

BENSON, J.

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pretation of contractual language in the collective bargaining agreement regarding prevailing wages and conditions, in order to resolve tort claims which do not arise under that agreement or require its interpretation; i.e., preemption is urged because the same set of facts must be addressed under both state law and the language of the collective bargaining agreement. However, we must reject this argument since here, as in *Lingle, supra*, "even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, *would require addressing precisely the same set of facts*, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." (—— U.S. at p. —— [108 S.Ct. at p. 1883], emphasis added, fn. omitted.)

The union reasserts the benefit of an absolute privilege which applies as between the *parties* to a labor contract under federal law, while citing no decision in which any court has held such a privilege applicable to bar the claims of third parties. The union cites only cases in which the victim of the alleged tortious conduct was an employee-party to the agreement, such as *Scott* v. *Machinists Automotive Trades D. Lodge 190* (9th Cir. 1987) 827 F.2d 589 and *DeTomaso* v. *Pan American World Airways, Inc., supra*. While parties to the labor agreement may invoke its grievance procedure and are barred from recasting their grievances as tort claims, third parties cannot invoke the grievance procedure and are not governed by it. We have held nevertheless that the union was *conditionally*, not absolutely, privileged to make the assertions to Southwest Marine it made here; and the union does not challenge our conclusion that sufficient evidence was presented below to preclude summary judgment in its favor on the issue of malice.

Finally, the union explicitly asserts a novel preemption argument; i.e., appellant's claims against it are within the exclusive jurisdiction

of the NLRB under the National Labor Relations Act (29 U.S.C. § 151 et seq.), rather than being preempted under section 301. We reject this contention since, as the Supreme Court noted in *Lingle, supra*, "§ 301 pre-emption is all that is at issue in this case . . . ." (—— U.S. at p. ——, fn. 8 [108 S.Ct. at p. 1883, fn. 8].) If appellant had contended the prevailing wage subcontracting provision of the labor contract was illegal, such a claim could well be within the exclusive jurisdiction of the NLRB. However, as the union concedes in its petition for rehearing, "No contention is made by Seaview that the subcontracting clause involved herein is unlawful." It is a non sequitur to assert that, since a claim of illegality of the collective bargaining agreement *not* made here would be preempted, the claims *actually* made here are preempted. This union argument in any event was flatly rejected by the U.S. Supreme Court in *Linn* v. *Plant Guard Workers, supra*, [malicious libel claim brought against union by person not a party to labor contract not barred by exclusive jurisdiction of NLRB]. (383 U.S. at p. 55.) As *Linn* demonstrates, the fact that a union may be exercising a right accorded by federal law (union organizing in *Linn*, or preparations for the filing of a grievance in support of a presumably lawful subcontracting clause here) dose not mean that a state law action is barred when the union maliciously commits alleged torts against third parties during the exercise of those federal rights.

APPENDIX B

ORDER DENYING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division Two, No. A043359
S013394

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

SEAVIEW INDUSTRIES, ETC.,
Appellant

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS, ETC. *et al.*,
Respondents

[Filed Feb. 14, 1990]

Respondents' petition for review DENIED.

Mosk, J. and Broussard, J. are of the opinion the petition should be granted.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed November 9, 1989, which appears at 215 Cal.App.3d 497. (Cal Const., Art.VI, Section 14; Rule 976, Cal. Rules of Court.)

/s/ Lucas
Chief Justice

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO

No. 859302

SEAVIEW INDUSTRIES, INC.,
a California Corporation
Plaintiff,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA, UNION NO. 1149, *et al.*
Defendants.

JUDGMENT

[Filed Aug. 2, 1988]

The Motion of Defendant for summary judgment came on regularly for hearing on January 12, 19888, before the Law and Motion Department of the above entitled court, the Honorable Lucy Kelly McCabe presiding. Plaintiff appeared by its attorney, Thomas J. LaLanne; Defendant appeared by their attorney, David Rosenfeld. Moving and responding papers having been presented by both parties, the case having been argued and submitted for decision, and the court, on request of the Defendants, granted a motion for summary judgment against the Plaintiff and for the defendants.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED:

1. That Plaintiff SEAVIEW INDUSTRIES, INC. take nothing by way of its complaint against Defendants UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, UNION NO. 1149, et al.

2. That Defendants be awarded their costs of suit incurred herein.

/s/ Lucy Kelly McCabe
LUCY KELLY MCCABE
Judge of the Superior Court

Dated: Jul. 29, 1988

Supreme Court, U.S.
FILED
JUN 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1766

In The

Supreme Court of the United States

October Term, 1989

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA,
UNION NO. 1149, RICK ANDERSON

Petitioners,

v.

SEAVIEW INDUSTRIES, INC.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

In a grievance proceeding regulated by its collective bargaining agreement, does a union have an absolute privilege to maliciously make defamatory statements about a third party which is not a party to that collective bargaining agreement?

LIST OF PARTIES

The parties to the proceedings below and before this Court are:

1. Petitioners: United Brotherhood of Carpenters and Joiners of America, Local 1149 and Rick Anderson (hereafter collectively "Union");

2. Respondent: Seaview Industries, Inc. (hereafter "Seaview").

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STATUTORY PROVISIONS INVOLVED

The relevant provision of the Labor Management Relations Act of 1947, 29 U.S.C. §185 (hereafter "§301"), relied upon by Union in its preemption argument is as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The relevant provision of the California Civil Code, §47(2), (3), relied upon by Union in its privilege argument is as follows:

> "A privileged publication or broadcast is one made . . .
>
> 2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure; . . .
>
> 3. In a communication, without malice, to a person interested, therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

JURISDICTION AND TIMELINESS

The jurisdiction of this Court in this matter is founded upon 28 U.S.C. §1257(3). The Petition for Writ of Certiorari was received by Counsel for Respondent Seaview on May 17, 1990. This Brief in Opposition to the Petition is timely filed on or before June 14, 1990 as provided in Rule 15.2 of the Rules of the Supreme Court of the United States.

STATEMENT OF FACTS

Seaview is a ship habitability subcontractor. Habitability work includes repairing and building living accommodations, such as galleys, heads and staterooms on board ships. In 1983, Seaview was one of six small companies in the San Francisco Bay Area which performed ship habitability repairs. Approximately 80% of the membership of Union were employees of these six companies.

Seaview was a member of a Collective Bargaining Agreement with Union which was to expire on December 31, 1983. By virtue of its entry into this agreement Seaview became obligated to make contributions to the Marine Carpenter's Pension Fund (hereafter "Fund") on behalf of its employees. In late 1983, Seaview and Union began negotiating for a new Collective Bargaining Agreement. After numerous discussions with Union, Seaview declared a bargaining impasse and announced that it intended to sever all relations with Union and Fund.

At or about this same time, Seaview entered into a Master Subcontract Agreement with one of the large shipyards in the San Francisco Bay Area, Southwest Marine of San Francisco (hereafter "Southwest Marine"). This Master Subcontract Agreement concerned work that was to be performed by Southwest Marine under an "AOR Phased Maintenance Program" on four U. S. Navy ships home-ported in the Bay Area. It was anticipated that this AOR Phased Maintenance Program would comprise most of the ship repair work the U.S. Navy would have performed in the Bay Area in the coming five year period. Private shipping companies had by this time ceased having habitability work performed in the Bay Area due to high labor costs and the threat of labor disruption. As a result, the habitability work under the AOR Phased Maintenance Program was going to be the only continuing source of habitability work available in the Bay Area during the next five years. Moreover, because of its entry into the Master Subcontract Agreement, Seaview was likely to perform all of this work.

After declaring its freedom from Union and Fund, Seaview continued to perform work on a limited basis. During this time Seaview paid all of its employees at least the prevailing wage rate, and some of them considerably more. Instead of paying contributions to Fund's health and welfare and pension plans, Seaview made direct cash payments to its employees of the same amounts it would have paid to Fund on behalf of these employees for these benefits.

On July 12, 1984, while Seaview was performing work on the first phase of the AOR Phased Maintenance

Program at Southwest Marine, Union called a strike. Seaview was able to finish this job despite difficult working conditions, threats, and actual instances of violence to its employees.

On July 26, 1984, Union filed a complaint against Seaview with the NLRB, alleging, among other things, that Seaview was not paying prevailing wage rates and conditions to its employees. The Regional Director of the NLRB concluded that, even though Seaview had made equivalent cash payments directly to its employees, it might still be obligated to make these same contributions to Fund because of its technical failure to properly terminate its contract. Even though it had already made these same payments directly to its employees, Seaview agreed to once again make them to Fund as proposed by the NLRB because it did not make economic sense to fight the issue. Thereafter, Seaview made arrangements for its carpenter employees to participate in its corporate retirement and health insurance plans. Both of these plans provided benefits to the employees which were equal to or better than those provided by the Fund.

On December 5, 1984, Seaview sent a letter to Union formally severing all contractual relations with Union and Fund. On December 13, 1984, Fund filed suit against Seaview in the United States District Court over the exact same issues that had been adjudicated and settled in the NLRB proceeding. Seaview moved for summary judgment claiming that Fund was collaterally estopped by the results of the prior NLRB proceeding. One day prior to the date scheduled for hearing of the motion, fund requested Seaview to stipulate to a dismissal of the action. The action was dismissed on March 25, 1986.

In February, 1986, Seaview was awarded the second portion of work under its Master Subcontract Agreement. Work on this $473,000 subcontract was scheduled to begin on April 14, 1986. On April 1, 1986, just six days after dismissal of Fund's District Court action, Union wrote the letter to Southwest Marine which is the subject of the complaint in this action. This letter was read by Ira Maybaum, the general manager of Southwest Marine, and others. Fearing not a mere grievance procedure as the letter suggested, but another strike such as that Union had called two years previously, Southwest Marine responded by cancelling its agreement to hire Seaview for any further work under the AOR Phased Maintenance Program, including the job then scheduled to start two weeks later.

The habitability work contemplated under the AOR Phased Maintenance Program had a total value of over $6,000,000. Based on the percentage of profits Seaview had made in the past on similar work, the estimated lost profits by Seaview as a result of the action of Union exceeded $2,000,000.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Union Has Made a Serious Misstatement of Fact

Union has alleged on page 6 of its petition,

> "It is also undisputed that this (the alleged defamatory letter) was published to no one other than Southwest Marine and the Pacific Coast

> Metal Trades District Council which is the multi-union party to the collective bargaining agreement."

This allegation was made for the first time by Union in its Petition for Rehearing to the California Court of Appeal. It was once again made in Union's Petition for Review to the California Supreme Court. On both occasions, Seaview has filed opposing briefs which have shown there is a dispute as to whom the defamatory letter was published. To reiterate, in Seaview's complaint filed in the San Francisco Superior Court it is stated that the "letter was seen and read by its addressee, Mr. Ira Maybaum, . . . and others . . . " (Record on Appeal, p. 4, ln. 16-18.)

Proof that the defamatory letter was published only to those with a legitimate interest in the grievance or arbitration proceeding is necessary to a claim of absolute privilege. *Hasten v. Phillips Petroleum Co.* (10th Cir. 1981) 640 F.2d 270, 274. It is understandable why Union would want to make such a claim. It is incomprehensible, however, that it should continue to do so when it is aware that a dispute exists on that point. While Seaview is reluctant to charge Union with intentionally attempting to mislead the Court, it feels this point must be made.

All of the cases cited by Union in support of an absolute privilege for defamatory statements made in the course of grievance proceedings contain the proviso that the statements must not have been disseminated beyond the proceeding, and in particular, to those who have no legitimate interest in the outcome of the proceeding. At the very least, the existence of a dispute about the persons or entities to whom the defamatory statements were

published requires trial, and prevents disposition of this litigation on a finding of absolute privilege.

Union Confuses the Two Separate and Distinct Doctrines of Preemption and Privilege

Union is confused about the relationship between the doctrines of preemption and privilege. All four of the cases that Union claims are in conflict with one another on these issues, namely *Linn v. Plant Guard Workers Local 114* (1966) 383 U.S. 53, *Old Dominion Branch No. 496 v. Austin* (1974) 418 U.S. 264, *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, and *Lingle v. Norge Division of Magic Chef* (1988) 486 U.S. ___, are in accord. All hold that §301 only preempts a state tort action where its resolution would require an interpretation of a collective bargaining agreement.

The California Court of Appeal, in addressing this issue, stated at page 10a of their opinion,

> "We conclude in any event that, under the applicable *Lingle* standard, the claims asserted were not federally preempted. The only issue here is whether the sender of the letter in question falsely and maliciously represented that appellant's business practices were other than they in fact were. To resolve that question, 'no interpretation of the collective-bargaining agreement is required' (*Rawson v. United Steelworkers of America, supra,* 770 P.2d at p. 797); and the union's acts are simply measured by state law. (Ibid.) In short, neither the reference by the union, in its allegedly libelous letter to Southwest Marine, to a conditional future intention to file a grievance under Article 23 of its collective bargaining agreement, nor the reference to prevailing wages and conditions under its 'Master

> Subcontract Agreement,' required 'interpretation' of the collective bargaining agreement on the state law issues of libel and interference with prospective economic advantage alleged in appellant's complaint. The disputes at issue here only tangentially involve reference to provisions of such agreement, involve a separate state law analysis that does not turn on the collective bargaining agreement, and accordingly are not preempted by federal law. (*Lingle v. Norge Div. of Magic Chef, Inc. supra* ___ U.S. at ___, ___, fn. 12 [108 S.Ct. at pp. 1882, 1885, fn. 12].)"

After identifying this "conflict," Union then proceeds to a discussion of how the circuit courts, district courts, and state courts have attempted to resolve this conflict by applying either an absolute or qualified privilege to statements made in grievance proceedings. Union is mistaken, however, in its characterization of their analysis. None of these courts attempt to resolve the issue of preemption with a discussion of privilege. Each of them treats privilege as a separate and distinct legal issue that has nothing to do with §301 preemption.

Of interest to Union is the fact that these various courts seem to apply different standards of privilege to these statements. Some have applied a standard of absolute privilege to statements made in grievance proceedings, while others have opted for a qualified privilege for such statements. Union proposes that creation of a uniform standard in this area through a decision in this case is reason for granting certiorari.

While creation of a uniform standard for treatment of these cases is an admirable pursuit, it cannot be attained through a decision in this case. The instant case does not fit the factual pattern of a single one of the cases cited by

Union. In each and every one of those 36 cases the victim of the alleged tortious conduct was an employee-party to a collective bargaining agreement. Seaview was not a party to Union's collective bargaining agreement.

In commenting on that issue, the California Court of Appeal stated in their opinion at pages 11a-12a,

> "However the union has not cited a case, nor has our own research discovered one, which extends this absolute privilege to actions by *third parties*, neither employees nor members of the union, who are subjected to tortious conduct in communications between parties to a collective bargaining agreement. The rationale which supports application of such an absolute privilege to the claims made by parties to the collective bargaining relationship does not support its extension to claims by third parties . . . The parties to a collective bargaining relationship may in some sense have assumed the risk of certain types of otherwise actionable tortious conduct against each other simply by virtue of their relationship. We do not see, however, why a third party should be charged with having assumed the risk that it will be injured by such tortious conduct.
>
> We believe that no absolute federal privilege applies to defeat such a third party's claim, and that instead only a qualified privilege under state law (Civ. Code, §47, subd. 3) is applicable."

The Opinion of The California Court of Appeal Will Not Restrict Unions and Employers From Resolving Disputes

Union claims on page 14 of its brief that,

"The opinion of the court below will have the effect of severely restricting unions and

> employers from forthrightly resolving disputes which arise under the terms of a collective bargaining agreement."

In fact, the Court of Appeal specifically addressed that issue when is stated, at page 13a of its opinion,

> "We emphasize we in no way detract from those precedents which hold that the parties to a collective bargaining relationship may not pursue each other in court over statements made in grievance proceedings. We simply hold that the parties to those proceedings have only a qualified, not an absolute, privilege as to claims made by third parties; and that those grievance proceedings may not be used with absolute immunity to perpetrate malicious attacks on third parties."

Seaview submits that the decision below will not restrict unions and employers from resolving their disputes with one another. The ruling is designed to and should prevent either union, employee or employer from using grievance procedures for the purpose of maliciously attacking innocent third parties who are not a part of that procedure. Such a result is entirely consistent with this Court's prior ruling in *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 212, in which it stated,

> "In extending the pre-emptive effect of §301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."

The Decision in *Rawson* Will Not Dispose of the Issue Presented by This Petition

Union's claim that the question presented in *Rawson v. United Steelworkers of America* (1988) 770 P.2d 794, cert.

granted, ___ U.S. ___, No. 89-322, is one that might dispose of the issues presented in this petition is misguided. *Rawson* is a state law negligence case filed by the survivors of several union members against the decedents' union. The issue involved is whether the union, in conducting a safety inspection of a mine where a fatal accident took place, had assumed a duty of care toward its members which exceeded those created by the collective bargaining agreement.

The duties of the union towards its members, normally called "fair representation," are defined in the collective bargaining agreement. To decide whether the union had assumed additional duties of care towards its members, possibly required interpretation of the terms of the collective bargaining agreement. No such interpretation is either necessary or possible in the instant case because Seaview is not a member of a collective bargaining agreement with Union. Thus *Rawson*, like all of the other cases cited by Union, is inapplicable to the decision in the instant case. It involves members of a collective bargaining agreement suing each other rather than an independent third party suing a member of a collective bargaining agreement.

CONCLUSION

For all of the reasons set forth herein and based upon all of the foregoing authorities, it is respectfully requested that this Court deny Union's Petition for Writ of Certiorari.

Dated: June 7, 1990

Respectfully submitted,

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89-1766

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No. [redacted]

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, UNION NO. 1149 and RICK ANDERSON,
Petitioners,

v.

SEAVIEW INDUSTRIES, INC., A California Corporation,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of California First Appellate District

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1760

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, UNION NO. 1149 and RICK ANDERSON,
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v.

SEAVIEW INDUSTRIES, INC., A California Corporation,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of California First Appellate District

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SUPPLEMENT BRIEF IN SUPPORT OF SUPPLEMENTAL BRIEF IN SUPPORT OF

In our Petition we demonstrated that there are two lines of cases which this Court has decided which have collided and caused widespread conflict between the state courts as to the treatment of defamation in the context of enforcing collective bargaining agreements. This Court's decisions with respect to defamation, *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966) and *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974), were decided outside the context of the en-

forcement of a collective bargaining agreement. In opposition to these cases are those in which this Court has held that Section 301 preempts state law claims in the context of the consideration of the terms of the labor contract. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) and *Lingle v. Norge Division of Magic Chef*, 486 U.S. —— (1988).

In our Petition we have shown that many state courts have held that there is an absolute privilege which attaches to the enforcement of collective bargaining agreements. Opposed to these courts are a number of courts which have held, to the contrary, that there is only a qualified privilege. In addition, while at least one federal circuit has adopted the absolute privilege standard, others have applied the qualified privilege standard. It is because of this pervasive conflict in an area where there is repeated litigation that we ask that this Court grant a plenary review of this issue.

The day before our Petition for Writ of Certiorari was filed, this Court issued its opinion in *United Steel Workers of America v. Rawson*, —— U.S. —— (1990). We file this supplemental brief because we believe that *Rawson* supports our Petition and requires summary disposition or, in the alternative, a remand so that the court below may take into consideration *Rawson*.

In *Rawson* the individuals argued that state law imposed obligations on the union with respect to its alleged negligent inspection of a mine where there was an accident causing the death of a number of miners. Those individuals sought to avoid the pre-emptive force of Section 301, 29 U.S.C. § 185, by characterizing their tort claim as sufficiently independent of the collective bargaining agreement. This Court rejected that argument.

Consistent with prior cases, this Court re-stated the proposition "that the pre-emptive force of § 301 extends beyond state-law contract actions." Because the Supreme

Court of Idaho had attempted to characterize liability under state law as negligent inspection by the union, rather than any duty imposed by the collective bargaining agreement, this Court was faced with the question of whether a state law tort could survive the existence of the collective bargaining agreement and § 301 pre-emption. This Court held that § 301 pre-emption governed because the "tort claim cannot be described as independent of the collective-bargaining agreement."

In this case we advance a more compelling argument that the claim of Seaview is wholly dependent upon the collective bargaining agreement. It is dependent for two reasons:

First, it is dependent because the collective bargaining agreement itself defined the conditions under which Seaview could perform as a subcontractor to Southwest Marine. Precisely, the subcontracting clause prohibited Southwest Marine from permitting Seaview to perform unless it paid "not less than the wage and conditions provided for in [the] Agreement." (See Petition, p. 5) This language in the collective bargaining agreement squarely governed the relationship between Southwest and Seaview.[1] Thus, the primary determination to be made by the court below will be the determination as "to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches with that agreement . . ." (*Rawson*, —— U.S. at ——.)

Second, the alleged defamation arose in the context of the union's attempt to enforce the collective bargaining

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[1] This case is distinguishable from *Lowe Excavating v. Operating Engineers*, 535 N.E. 2d 1005 (Ill. App. Ct. 1989), cert. denied, —— U.S. —— (1989). In that case, there was no collective bargaining agreement which defined the duties of the parties for the union was engaged in picketing to obtain a contract. The Illinois Appellate Court expressly recognized this distinction and refused to apply any pre-emption because of the non-existence of a collective bargaining agreement.

agreement. As we have demonstrated in our Petition, Section 301 pre-emption extends to protect the union's efforts to enforce the collective bargaining agreement through the filing and processing of grievances. As we pointed out, some courts have held that there is an absolute privilege to communications made in the course of the grievance procedure. Other courts, to the contrary, have held that only a qualified privilege exists. It is this conflict which petitioners believe this Court needs to resolve. Moreover, the necessity of applying the absolute privilege and of applying Section 301 pre-emption becomes predominant where the entire dispute *is* the meaning of the underlying collective bargaining agreement.[2]

Rawson, therefore, stands for the proposition that state law safety claims do not overcome § 301 pre-emption where it is necessary to interpret the terms of a collective bargaining agreement. Here, that interest is doubly implicated both because of the necessity to interpret the language of the subcontracting clause, but also because of the unwarranted interference in the processing of grievances and the arbitration procedure.

For the reasons stated in our Petition, as well as in this Supplemental Brief, this Court should either grant the Petition for Writ of Certiorari and set the matter down for plenary consideration or summarily grant the

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[2] In many defamation cases, the alleged slander arose out of comments made about individuals or entities during the course of the processing of the grievance procedure. Determining whether the statements were slanderous would not necessarily involve any interpretation of the agreement. Nonetheless, slander was held pre-empted in order to protect the grievance procedure, not to protect the language of the collective bargaining agreement from inconsistent state interpretations. Here, we seek not only to protect the grievance procedure, but also to enforce the application of uniform federal law with respect to the meaning of the subcontracting clause, particularly in light of the extensive regulation of subcontracting clauses under 29 U.S.C. Section 158(e).

Petition, reverse and remand for further consideration in light of *Rawson*.

Respectfully submitted,

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June 11, 1990